

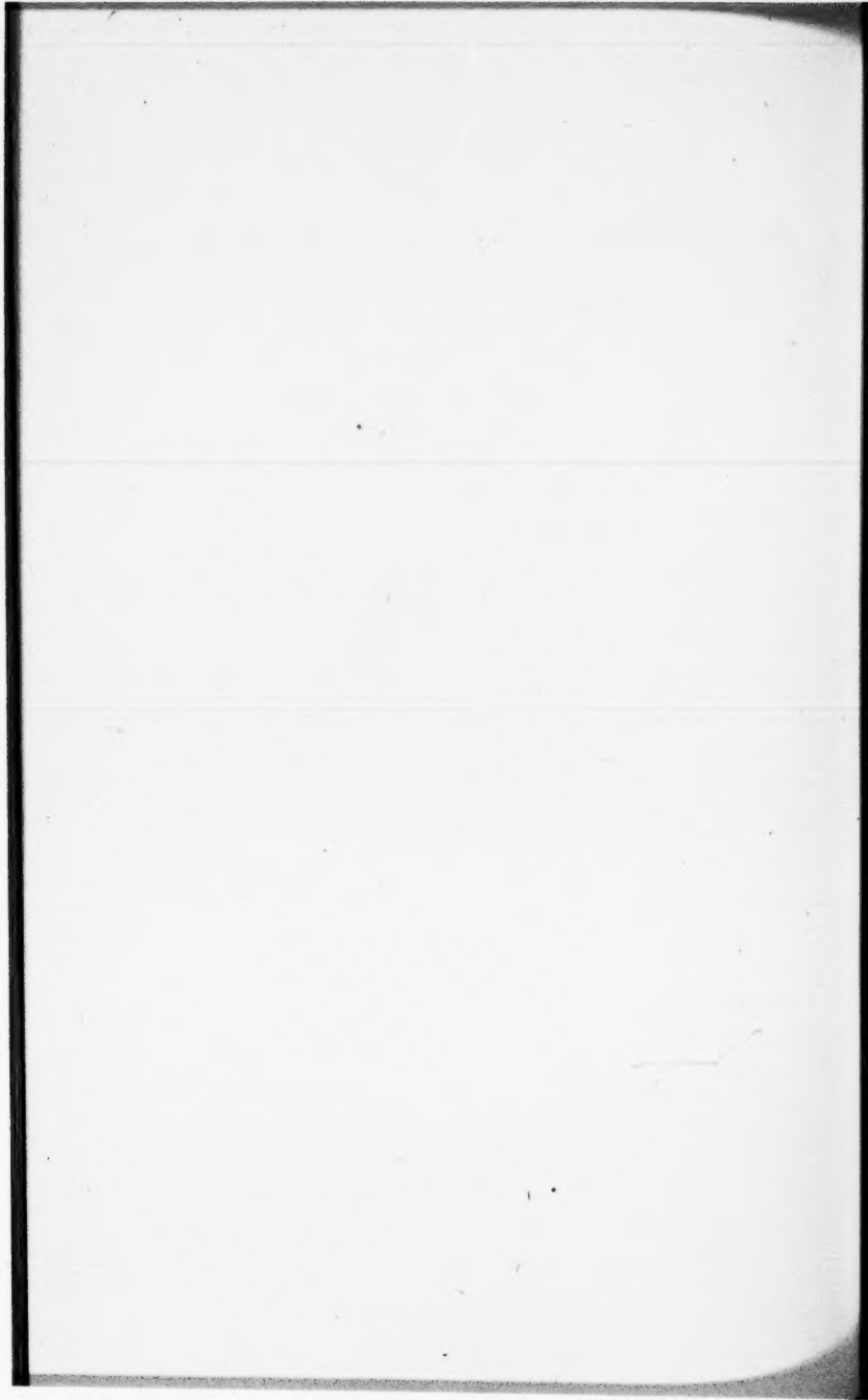
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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 162

JOHN KLINGER, ALIAS JACOB KLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Circuit Court of Appeals (R. 152-154) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 28, 1943 (R. 154-155). The petition for a writ of certiorari was filed on July 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crim-

inal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the District Court erred in permitting the Government to cross-examine petitioner, who took the stand in his own behalf and denied having committed the offenses with which he was charged, to show that he had declined to testify to the same matters before a grand jury on the ground that his answers might tend to incriminate him.

STATEMENT

Petitioner seeks review of a judgment of the Circuit Court of Appeals affirming his conviction, following a jury trial (R. 5-6, 136), in the District Court for the Southern District of New York on two counts of a criminal information charging him with the unlawful possession and transfer of gasoline rationing coupons.

On the appeal to the Circuit Court of Appeals he assigned as error, among others, the action of the trial court in allowing the prosecutor, after petitioner on direct examination had denied the acts with which he was charged, to bring out on cross-examination that he had refused to testify to these matters before the grand jury on the ground that his testimony would tend to incriminate him (R. 143). The Circuit Court of Appeals held that this was not error and affirmed.

In the trial court the Government introduced testimony in chief tending to prove the following facts:

Petitioner was regularly engaged in the business of unlawfully supplying gasoline coupons to the operator of a filling station where he maintained an office and to such other persons as desired to acquire coupons illegally (R. 22-27). On October 19, 1942, petitioner offered to sell (R. 28), and did sell, two "C" ration books which were unlawfully in his possession to a detective posing as a grocery salesman for the sum of \$30, which was paid to him in marked money (R. 48). He was promptly arrested and \$10 of the marked money was recovered from him (R. 50). He offered to bribe the arresting officers to release him (R. 66) but was taken into custody together with one Landau, who was with him at the time of the sale and arrest (R. 67). He was then taken to the office of a representative of the Office of Price Administration named Barnett and questioned. Thereafter petitioner told one of the arresting officers that he would not tell Barnett anything but admitted to the officer that he had sold the two books in question (R. 67). When questioned at the lineup in the police station on the following morning petitioner again admitted that he had sold the two books (R. 75).

Petitioner took the stand in his own behalf at the trial and denied that he had ever had the

ration books in question in his possession and denied that he had ever offered to sell or sold these or any other ration books to anyone (R. 87-91). He admitted having had possession of the marked \$10 bill but said that it had been given to him by Landau in repayment of a loan made to Landau's wife three days before (R. 92). He further testified that the entire \$30 was paid to Landau for the ration books in question, which he claimed were in Landau's possession rather than his (R. 91-92).

On cross-examination petitioner admitted that when questioned by Barnett immediately after his arrest he had not given this story about Landau's selling the books, having simply told Barnett that "I would not say anything without my lawyer" (R. 100). The cross-examination further developed that on the following day petitioner appeared with his lawyer at the United States Attorney's office and again declined on the advice of counsel to make any statement (R. 106), and that he was then called before the grand jury and sworn as a witness (R. 100).

He was then asked on cross-examination whether he had told the grand jury that Landau, not he, had sold the books. He failed to answer. The court thereupon inquired whether he told the grand jury how this transaction took place. He replied "My lawyer told me not to say anything because anything they say they will hold against you * * *" (R. 100). He was then

asked by government counsel whether he had refused to answer some of the questions before the grand jury, and he replied "Any time you asked me a question I told you I would not say anything because my lawyer told me" (R. 101). He was also asked whether he was questioned before the grand jury as to whether or not he had sold any books, and he again replied that he had refused to answer because his lawyer had told him not to say anything (R. 101-102). He was then asked whether he had refused to answer on the ground that his answer might incriminate him, but he failed to respond to the question (R. 102). Then he was asked whether in response to a question before the grand jury concerning whether in the past six months he had sold any gasoline ration coupon books to anyone he had refused to answer on the ground that it might incriminate him. Again he failed to answer (R. 103). Objections to all of these questions were overruled by the trial court.

The petitioner then denied that he had made the admissions to the police officers relied on by the Government (R. 105) and offered several witnesses to corroborate his claim that Landau, not he, was the possessor and seller of the books and to impeach the government's witnesses (R. 107-119).

In rebuttal, the Government called the police stenographer who recorded the answers of the

petitioner during the line-up on the morning after the arrest. He read his transcript of the petitioner's answer admitting the sale of the ration books (R. 123-124).

The charge to the jury (R. 125-135) made no reference to the evidence regarding petitioner's behavior before the grand jury. Petitioner asked for no instruction concerning the use of this evidence by the petit jury.

ARGUMENT

The sole reason relied upon by petitioner for allowance of the writ of certiorari is that the ruling of the Circuit Court of Appeals is in conflict with the decision of this Court in *Johnson v. United States*, 318 U. S. 189.

There plainly is no merit in this contention. In the *Johnson* case it was said that where a claim of privilege is made by the accused during trial and sustained by the court, even though erroneously, it is improper to permit the prosecutor to comment prejudicially upon the claim in his argument to the jury. The reason given was that it is obviously improper to comment on the claim when it has been properly granted, and if it is mistakenly granted the defendant has the right to rely upon the ruling and presume that the rule against comment will be observed. To do otherwise would mislead the defendant and deprive him of an intelligent choice between claiming or waiving his privilege.

Neither that ruling nor the reasons supporting it apply in this case. Petitioner refused to answer questions before the grand jury concerning his possession and sale of the ration books on the ground that his answers might incriminate him. He then took the stand in his own behalf at his trial and testified to the same subject matter in a manner which exculpated rather than incriminated him. Government counsel on cross-examination brought out his refusal to give this testimony before the grand jury on the ground of self-incrimination for the purpose of testing his credibility and the truth of his explanation to the trial jury. There was no ruling sustaining a claim of privilege by petitioner during his trial on which he was entitled to rely. He has in no way been misled or deprived of an intelligent choice between claiming or waiving his privilege.

Rather than being in conflict with any decision of this Court, the ruling of the court below is squarely in accord with the decision in *Raffel v. United States*, 271 U. S. 494. There it was held that where the defendant voluntarily testified in his own behalf upon the second trial of an offense and denied having made a statement put in evidence by the Government, it was proper on cross-examination to compel him to disclose that he had not taken the stand in the first trial to make the same denial and to explain his reason for not doing so. The Court ruled that the accused

waived his privilege completely by becoming a witness and there was no reason for qualifying this rule to permit him to preserve silence regarding his conduct on the first trial, saying (p. 499):

The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

Nothing said in the *Johnson* case casts doubt upon the *Raffel* decision. The latter case is cited as authority in the former on a subsidiary question. The fact that this Court did not deem it necessary to distinguish the *Raffel* case in the *Johnson* opinion demonstrates the vast difference between the circumstances in the two cases.

As in the *Raffel* case, petitioner here waived his privilege when he took the stand in his own behalf. He undertook to give his version regarding the possession and sale of the ration books. He thereby subjected himself to full cross-examination, including examination for the purpose

of impeaching his credibility. *Raffel v. United States, supra*; *Reagan v. United States*, 157 U. S. 301, 305; *Fitzpatrick v. United States*, 178 U. S. 304, 316. His behavior before the grand jury suggested that he had either made a false claim of privilege with respect to the answers sought there or that he had testified falsely at the trial. The trial jury was entitled to consider his refusal before the grand jury to answer questions similar to those he answered freely at the trial, together with all other conduct inconsistent with the innocent explanation on which he relied at the trial, for the purpose of testing the truth of that explanation.

Petitioner's argument that the decision below will permit a prosecutor to require a defendant to confess or claim his privilege before the grand jury and then use his claim against him at trial, and that under these circumstances a defendant could never testify in his own behalf at trial, misconceives the nature of the privilege. A witness before the grand jury has no unqualified privilege to remain silent. His privilege is limited to a refusal to give testimony which might tend to incriminate him. He has no privilege to withhold the truth from the grand jury in case it tends to exculpate rather than incriminate, as the disclosure of such innocent explanations as may exist for apparently criminal conduct is a part of the investigatory function. At the time of trial, a defendant has a choice between testi-

lying or remaining silent. If he has made a false or dubious claim of privilege before the grand jury in refusing to supply facts which were not of an incriminatory nature and he desires to present those facts to the trial jury, he knows that in doing so he will be subjected to some embarrassment by virtue of his prior inconsistent claim. However, this is only one phase of the dilemma that confronts any defendant when he offers himself as a witness. In doing so he opens up the whole field of his past relevant conduct in connection with matters about which he testifies, including prior inconsistent statements of all kinds, whether made in the course of an investigation, at a trial, or elsewhere.

This contention of petitioner is much like that made in the *Raffel* case. There it was suggested that to hold that a defendant could be compelled to disclose that he had not testified at the earlier trial and to explain his reasons might result in pressure on a defendant to testify at the first trial for fear of the consequences of his silence in the event of a second trial, and might influence him to remain silent at the second trial because his failure to testify at the first could be used against him. The Court rejected this argument, saying that "these refinements are without substance" (271 U. S. at 499).

In short, the constitutional privilege under discussion is designed only to protect the defendant from involuntarily supplying testimony which

might tend to incriminate him. It offers no protection whatsoever against the damage to credibility resulting from an inconsistent tactical manipulation of the privilege, such as occurred in the *Raffel* case and in this case.¹

CONCLUSION

The decision below is not in conflict with any decision of this Court, but on the contrary is in harmony with the ruling in the *Raffel* case. No conflict with decisions in other circuits is claimed. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT L. WRIGHT,
KENNETH L. KIMBLE,
Special Assistants to the Attorney General.

AUGUST 1943.

¹This Court denied certiorari to review a substantially similar question in *United States v. Buckner*, 108 F. 2d 921 (C. C. A. 2), certiorari denied, 309 U. S. 669. There the lower court held that the prosecutor was entitled to cross-examine the defendant concerning the reasons why he had claimed his privilege before the Securities and Exchange Commission in refusing to answer questions regarding a profit-sharing scheme, when he testified that there was nothing wrong about the scheme at his trial on a mail fraud charge. This ruling was one of the reasons relied upon in seeking certiorari.